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No. 79-167

In the Supreme Court of the United States

OCTOBER TERM, 1979

ALBERTO EFRAIN HERNANDEZ-FERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JANIS H. KOCKRITZ
Attorney
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The judgment order of the court of appeals (Pet. App.) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1979. A petition for rehearing was denied on June 28, 1979. The petition for a writ of certiorari was filed on July 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the answer given by a government witness to a question posed by petitioner's counsel was so prejudical as to require a mistrial, where the court immediately instructed the jury to disregard the answer.

2. Whether testimony concerning a drug transaction that took place early in the conspiracy was properly admitted.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, and for possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was also convicted of carrying a firearm during the commission of a felony, in violation of 18 U.S.C. 924(c)(2).[1] He was sentenced to terms of imprisonment totalling five years and to a three-year special parole term. The court of appeals affirmed.

The government's evidence showed that on January 16, 1978, DEA undercover Agent Vincent Mazilli contacted Lonnie Levin and discussed with him the purchase of cocaine (Tr. 29-30). This transaction was confirmed the following day when Mazzilli agreed to purchase from Levin five kilograms of cocaine at $39,000 per kilogram (Tr. 31-33, 36).

On January 18, 1978, Mazzilli and another DEA agent attempted to obtain delivery. After permitting Levin and Arthur Alamo to view the purchase money, the agents accompanied the two men to an apartment building where Mazzilli met with a third man, Juan De La Cruz Garcia (Tr. 34-42, 208). When Garcia was satisfied that the

[1]Other individuals charged in the conspiracy were Lonnie Levin, Juan De La Cruz Garcia, Arthur Alamo, Senen Hurtado and Karl Alan Zurcher. Each of these co-defendants pled guilty prior to trial, and Arthur Alamo testified as a government witness at petitioner's trial (Pet. 3).

agents were able to pay for the cocaine, he announced he would call the source to obtain delivery (Tr. 49). Garcia then called a telephone number listed to petitioner's business, but could not reach his source (Tr. 51-52, 145). Later that afternoon, Garcia told Alamo that the cocaine was on the way and that the agents should return to the apartment (Tr. 53).

When the agents returned to the apartment, they gave Garcia the $39,000, and the agents waited for the cocaine to arrive (Tr. 72). The agents began to leave at 6:30 p.m., however, because the source still had not arrived. Alamo stopped them from driving away by announcing that "Alberto" had just called and said he was coming (Tr. 76-77, 148, 222). Petitioner arrived one-half hour later and was greeted as "Alberto" (Tr. 79-80, 225). Senen Hurtado, who arrived with petitioner, then opened a suitcase he had brought and handed an agent a kilogram of cocaine (Tr. 80-81). Petitioner and the other co-conspirators (except Levin who had left the apartment earlier) were then arrested.

ARGUMENT

1. Alamo pleaded guilty and testified for the government at petitioner's trial. Petitioner contends (Pet. 4-5) that one of Alamo's answers to a question posed by defense counsel was so prejudical as to require a new trial.

The question and answer to which petitioner objects were as follows (Tr. 169-170):

A. As a matter of fact, is it not true that you did not know Albert Hernandez, the defendant in this case?

Q. I had seen him and people had pointed him out to me as being a cocaine source.

Petitioner's counsel immediately moved for a mistrial. The trial court denied this motion, but did immediately instruct the jury as follows (Tr. 171-172):

> Now, ladies and gentlemen, the question of this witness, as I recall it, although it was phrased with some—is it not true that you did not or something of that nature, I think the question was did you know this man before a certain date.
>
> The answer that this gentlemen gave was not responsive to that question.
>
> He discussed something with you about what other people had told him which is entirely inadmissible for your consideration.
>
> We do not try cases on the basis of the fact that somebody said somebody else told me so-and-so.
>
> That is known as hearsay and there is no opportunity to cross examine anybody that may, if you believe that, have told this man anything.
>
> That is not evidence for you to consider in this case, you understand what I am saying to you.
>
> There are people that tell folks that Judge So-and-so will take a bribe.
>
> Well, certainly if that man could come in and testify, hey, Frank told me that such-and-such would happen, therefore, it is true, you understand what I am saying to you. Do not consider that answer.

When otherwise improper hearsay has been invited by the defendant's questioning, no reversible error occurs by its admission. See *United States* v. *Doran*, 564 F. 2d 1176, 1177 (5th Cir. 1977), cert. denied, 435 U.S. 928 (1978);

United States v. *Duff*, 551 F. 2d 187, 189 (7th Cir. 1977); *United States* v. *Brooks*, 449 F. 2d 1077, 1082 (D.C. Cir. 1971). In this case, defense counsel could well have anticipated that, in asking Alamo if he actually knew petitioner, it would be natural for Alamo to respond by stating the circumstances in which they became acquainted. But even if this testimony was uninvited, the trial court, through its instructions emphatically admonishing the jury not to consider Alamo's hearsay response, cured any possible prejudice. See *United States* v. *Harris*, 558 F. 2d 366, 369 n.4 (7th Cir. 1977); *United States* v. *Cordova*, 537 F. 2d 1073, 1077 (9th Cir.), cert. denied, 429 U.S. 960 (1976). See also *Frazier* v. *Cupp*, 394 U.S. 731, 735-736 (1969). Under these circumstances, the court did not abuse its broad discretion over matters of this nature (*Arizona* v. *Washington*, 434 U.S. 497, 510-514 (1978)) in declining to abort the trial.[2]

2. Petitioner also argues (Pet. 5) that the district court should not have admitted Alamo's testimony that he and three other men purchased a kilogram of cocaine from petitioner on January 13, 1978 (Tr. 134-137). This contention is without merit.

Rule 404(b), Fed. R. Evid., provides that evidence of other crimes, wrongs, or acts may be admissible to prove a defendant's knowledge, intent, preparation, or plan. Petitioner testified that he had no knowledge of what was inside Hurtado's suitcase and that he had accompanied Hurtado to Garcia's apartment hoping to obtain repayment of a debt (Tr. 338-339, 342-343, 346-347). In light of this defense, the admissibility of the challenged evidence is

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[2]Even without the curative instruction, it is highly unlikely that Alamo's answer would have prejudiced the defense; for petitioner's own admissions to DEA agents confirmed that he was a cocaine source (Tr. 295-298).

apparent. Testimony that petitioner sold cocaine to co-conspirators on January 13, 1978, was probative of petitioner's intent on January 18, 1978. See *United States* v. *Maestas*, 546 F. 2d 1177, 1180-1181 (5th Cir. 1977); *United States* v. *Riggins*, 539 F. 2d 682, 683-684 (9th Cir. 1976), cert. denied, 429 U.S. 1045 (1977); *United States* v. *Czarnecki*, 552 F. 2d 698, 702 (6th Cir.), cert. denied, 431 U.S. 939 (1977).

In any event, the conspiracy charged in the indictment included Garcia, Levin, and Alamo, as well as petitioner, and covered the dates January 13, 1978 through January 18, 1978. The indictment listed, as an overt act, the purchase by Levin and Alamo of approximately 1,000 grams of cocaine from Garcia on January 13, 1978. Alamo's testimony, therefore, was not extrinsic evidence of a prior offense, but rather evidence tending to establish the existence on January 13, 1978, of the conspiracy with which petitioner was charged.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JANIS H. KOCKRITZ
Attorney

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